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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 239

ROY ISAACS, *et al., Petitioners,*

vs.

OKLAHOMA CITY, *et al., Respondents.*

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI

COUNTERSTATEMENT

Contrary to the claims made by respondents (Brief page 3, last paragraph), the challenge in this case is directed to the validity of the provisions of the statutory scheme of redevelopment law, which fences out and excludes from the right of franchise and its exercise, individuals in cities having over 100,000 population.

The challenge of infringement of the U. S. Constitution, involves the unreasonableness of, *classification by numerical population, as the sole basis for differing treatment of individuals on voting rights* concerning redevelopment. The arbitrary, numerical classifications are

contained in each of three otherwise identical enactments comprising the Oklahoma Statutory Redevelopment Law for all cities of the state.

The sole basis therein for differing treatment of individuals is the numerical classification made in the application section of the second and third enactments (actual re-enactments of the first act, with the voting provision added thereto), fencing out the right of franchise complained of. The other identical provisions of each enactment, together with the brief interval of elapsed time between enactments provides conclusive proof that all had a *single common purpose*, i. e., redevelopment, having no rational relationship to the arbitrary classification made solely to provide differing treatment in the rights, power and authority granted to segments of individuals and withheld from other segments of individuals similarly qualified.

The urban redevelopment statutory scheme applicable to all cities of Oklahoma is challenged in this action. The cause for the challenge was precipitated by the June, 1959, enactment. It first provided *differing treatment for individuals*, regarding the right of franchise, by its arbitrary population classification fencing out individuals in Tulsa and Oklahoma City from exercising the right of franchise on the same subject matter. The subsequent enactment (1961), merely repeated the numerical classification fencing out scheme, as the *sole basis for the discrimination provided therein between individuals*, otherwise equally qualified. Such differing treatment, without reasonable or valid basis, constitutes "invidious discrim-

ination," infringing the rights of petitioners under the equal protection clause and the due process clause of the 14th Amendment to the U. S. Constitution.

The "equal protection" clause requires judicial inquiry and consideration of whether the classifications drawn by any statutory scheme constitutes an arbitrary and "invidious discrimination." *Loving* v. *Virginia,* 18 L. ed. 2d 1010, 1017; June 12, 1967.

The situation presented in this case requires review on the merits, by issuance of the writ. The implied decision by the Oklahoma Supreme Court of non-infringement of the equal protection and the due process clauses of the federal Constitution involves a federal question of substance not heretofore specifically decided, but decided by said State court in a way *not in accord* with *applicable decisions of this court.*

REPLY TO RESPONDENTS' REASON NO. 1

The general purpose of urban renewal law is not challenged in this action; nor is its public purpose under attack.

It is the arbitrary numerical classification therein causing "invidious discrimination" that offends the equal protection guarantee of the Constitution, concerning individual rights of franchise, recognized in *Ferguson* v. *Skrupa,* 372 U.S. 726, but spelled out with greater clarity in *Carrington* v. *Rash,* 13 L. ed. 2d 675, that are the cause and subject of complaint herein.

We are not here concerned with legislation regulating professions or occupations, but *with legislation vio-*

lating the principles concerning *equal rights of franchise* under the 14th Amendment. The "invidious discrimination" caused by arbitrary, oppressive and capricious classifications was created with the enactment of June, 1959. It first provided the *right of franchise, limited to individuals* in cities between 10,000 and 100,000 population. It *contained all the identical provisions of the April 1959, enactment.* By *numerical exclusion in the June, 1959, act, large segments of individuals are fenced out from the right of franchise and its exercise* therein granted. Thus, we have class legislation discriminating against some persons and favoring other persons on rights of franchise, contrary to the requirements of the federal Constitution.

The "equal protection" clause requires consideration by this court of whether the classifications drawn by any statute, constitutes an arbitrary and "invidious" discrimination. The clear and central purpose of the 14th Amendment is to eliminate *all official state sources of invidious discrimination on voting rights between individuals within the state,* as much so as on the right to choose and marry regardless of race. *Loving* v. *Virginia, supra.*

This court has consistently denied the constitutionality of measures which, without any rational, reasonable or valid basis therefor, discriminate between the *voting rights of individuals* having otherwise equal qualifications. The 14th Amendment requires that the right of self determination and of voting by individuals, not be more restricted for *those in large population centers* than for

those in smaller population centers on subjects recognized by the Legislature as common to all such groups.

The central fallacy of the reasoning presented by respondents lies in their erroneous assumption (Brief page 7) that,

> "The sole question presented in this dispute is whether there was a reasonable basis to support the legislative determination to restrict the application of urban renewal to cities exceeding 100,000 population."

Such assumption would be correct but for the enactment of June, 1959, and the later enactment of 1961. With the June, 1959, enactment there was presented the central question in this dispute, and that is, *whether there was a reasonable basis to support the legislative determination to grant voting rights and impose obligations upon individuals in the cities covered by its classification* and to *exclude or fence out voting rights for the individuals in cities exceeding 100,000 population.*

Thus, the determination by the Oklahoma Legislature to apply urban renewal to *all cities in excess of 10,000 population, but only those individuals in cities under 100,000 population were given the right to vote on implementation of urban renewal, whereas individuals in cities in excess of 100,000 population were excluded and fenced out from such rights by the classification made in the June 1959, enactment,* presents an "equal protection" and "due process" issue. This legislative determination made, *constitutes an unreasonable exercise of legislative power* without any valid basis discernible for such fencing out. To the contrary, such arbitrary determination patently

reflects "invidious discrimination" in violation of the federal Constitution, requiring review by this court, to prevent the further spread and use of such legislative scheme and device herein complained of.

REPLY TO RESPONDENTS' REASON NO. 2

Heretofore we have noted that prior to June, 1959, no issue of discrimination between individuals was inherent in the April 1959, enactment, in its application to cities in excess of 100,000 population.

But an altogether different matter was presented by the June, 1959, enactment. The June, 1959, act first made obvious and presented the statutory scheme herein complained of:

(a) It re-enacted all the material detail provisions of the April, 1959, act concerning redevelopment and its purpose.

(b) It *added thereto* the *voting rights requirement* (11 O.S.A. 1657(c)); but by its *arbitrary numerical classification as the sole basis thereof* (Section 1652), *excluded the individuals in the cities having in excess of 100,000 population from having or exercising such voting rights, with no other rational basis for their exclusion* from such rights.

Thus, without the voting rights provision of the June, 1959, act, or without the arbitrary numerical classification made in the June, 1959, act, there would be no cause for the complaint herein made. There would be no dis-

crimination between individuals, having like qualifications, on the matter of the right of franchise concerning urban redevelopment.

We recognize that the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper, *provided, of course, no discrimination is made between individuals in violation of the federal Constitution. Pope* v. *Williams,* 193 U.S. at 632; 48 L. ed. at 822. The foregoing principle was followed by this court in its decision and opinion in *Carrington* v. *Rash,* 13 L. ed. 2d 675, in holding unconstitutional provisions of the Texas Constitution discriminating against individuals in the military service. Therein it was vainly argued that their exclusion from voting was justified by local administrative benefits in saving additional election expenses; and also justified, in that possible political control of local affairs might be obtained by those in the military service exercising the right to vote. The same or similar arguments are advanced by respondents in the first paragraph, page 11 of their Brief. The answers to such arguments were made in the above cited case, quoted in our Petition at pages 14 and 15. There can be no real or substantial justification for voting distinctions between individuals in cities over 100,000 population and cities under 100,000 population. Such distinctions, when made in relation to voting rights, are purely *political distinctions* and *not real or substantial.* They present the same evils inherent in the differing treatment accorded individuals shown by the State Legislature reapportionment

cases recently before this court. This court in those cases refused to recognize that the individuals in large centers of population were entitled to less representation, or less voice by their vote, than in the smaller centers of population.

Contrary to respondents' claim (Brief, page 11), there is as much or more obvious basis in fact for disagreement on the need for redevelopment in cities over 100,000 population as there is basis in fact for such disagreement in cities under 100,000 population, and especially so, where the city *ages* are similar.

There is patently no legitimate overriding purpose, independent of arbitrary invidious discrimination in voting rights provided by the statutory scheme of redevelopment legislation, *which can rationally justify the arbitrary numerical classifications* made in the Oklahoma Redevelopment Statutes, *to fence out and exclude individuals in its two largest cities from the right to vote,* where such right is accorded to and required of similarly qualified individuals in smaller cities of the state for the same purposes.

The State court cases cited by respondents (Brief, page 10) discloses some factual (financial) basis for differing treatment in the objects sought to be accomplished by the legislation. The Oklahoma court, however, cites the Kansas and the Tennessee cases in its opinion, affirming the lower court, in support of its contention that the state Constitution was not violated. But the Oklahoma court in its opinion does not pretend to justify the dif-

fering treatment concerning voting rights by the classifications made in the enactments complained of (June, 1959, and 1961.) Instead, it excluded proper consideration thereof by erroneously stating (Petition Appendix page XIX):

> "The constitutionality of only one act, 11 O. S. 1961, Sections 1601-1620, is at issue here * * *."

After reciting in its opinion (Petition Appendix page XVIII:

> "Plaintiff argues that to deprive the citizens of a city with a population of 100,000 of the right to vote on such an issue is unreasonable and arbitrary and violates the equal protection of the law guaranteed by the 14th Amendment of the U. S. Constitution and the requirements of the Oklahoma Constitution that laws of a general nature shall have uniform application throughout the State."

We are thus confronted with a situation wherein a State Supreme Court (Oklahoma) compounds the usurpation of power by its state legislature by refusing to recognize that an issue for judicial inquiry and review, for infringement on the U. S. Constitution is presented by a state statute, which, in the statutory scheme of arbitrary numerical population classifications therein made, is the sole basis for differing treatment of individuals; and gives certain groups not only the right to vote, but requires their majority approval while excluding other individuals from such rights, by the numerical classification fencing out process, on identical subject matters involving otherwise equal qualifications of all such individual voters.

The denial of the rights of franchise, to the individual citizens of Oklahoma, residing in Oklahoma City and

Tulsa, for *no discernible reason other than their population exceeding 100,000* may be considered politically advantageous by politicians, but is prohibited by the clear and central purpose of the 14th Amendment.

Such statutory scheme of discrimination is odious to a free people whose institutions and rights of franchise are founded upon the doctrine of equality.

This court performs its greatest function in requiring observance by the states of the limitations and requirements of the federal Constitution, especially the equal protection and due process clauses of the 14th Amendment.

The patent discrimination disclosed by the Oklahoma statutory scheme, concerning the fundamental right of franchise, on the common subject of redevelopment law, requires review by this court on the merits of such statutory scheme.

It is immaterial that the parties here may differ on whether the legislation complained of presents a "sophisticated" or "simple-minded" mode of discrimination. The federal Constitution forbids both. *Lane* v. *Wilson*, 307 U. S. 268, 275; 83 L. ed. 1281, 1287; 59 S. Ct. 872; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342; 5 L. ed. 2d 110, 113; 81 S. Ct. 125; *Wesberry* v. *Sanders*, 376 U.S. 1; 11 L. ed. 2d 481; 84 S. Ct. 526; *Reynolds* v. *Sims*, 12 L. ed. 2d 506 at 528; 377 U. S. 533; 84 S. Ct. 1362.

The theme of the Constitution is equality among citizens in the exercise of their political rights. *MacDougall* v. *Green*, 335 U. S. at 288, 290; 93 L. ed. at 9, 10, from the opinion by Mr. Justice Douglas.

The statutory scheme, "fencing out," and excluding the individual citizens of Oklahoma's two largest cities from an *equal right to vote for or against the creation of an urban renewal authority,* granted to individuals in smaller cities, solely on the basis of arbitrary population classification, denies equality to citizens in the exercise of their fundamental political rights. The statutory scheme constitutes "invidious discrimination" prohibited by the federal Constitution, and particularly by the 14th Amendment thereto.

SUMMARY

(1) The public purpose of the Oklahoma redevelopment statutory scheme is not challenged in this case.

(2) The principal question presented is, whether there was any reasonable basis in fact, as distinguished from purely political considerations, to support the legislative determination, to grant voting rights and impose obligation upon individuals in cities having less than 100,000 population, and by arbitrary numerical classification *as the sole discernible basis therefor, to exclude and fence out all individuals similarly qualified, in cities having populations in excess of 100,000, from the right of franchise and its exercise concerning urban redevelopment.*

(3) The challenge presented involves the entire statutory scheme for *implementing and creating urban renewal authorities,* as it relates to and provides for, the inclusion of some individuals and the exclusion of other

individuals from exercise of the right of franchise granted therein.

(4) The privilege of individuals to vote is within the jurisdiction of the states, but *the states are subject to the limitations of the federal Constitution that no discrimination is made between individuals concerning the right to vote.*

(5) Political distinctions, and distinctions claimed, as saving time and expense, do not provide any reasonable or rational, *factual basis for differing treatment of fundamental rights of franchise of individuals,* in a statutory scheme covering a subject common to those included and those excluded from the right and its exercise.

(6) The equal protection clause guarantees the opportunity for equal participation by all equally qualified city voters under a statutory scheme to determine whether their city should create an urban renewal authority. The state may in its jurisdiction *withhold the right to vote on urban renewal from all individuals* or it may in its jurisdiction *grant the right to vote thereon to all individuals; but it may not grant the right to some and withhold it from others,* similarly qualified, on the sole basis of numerical population, without other discernible factual differences relating to redevelopment and urban renewal, to justify differing treatment of individuals.

(7) The insulation from federal judicial review is not carried over when the state power is used as an instrument for circumventing the federally protected right.

(8) The federal Constitution forbids sophisticated, as well as simple-minded, modes of discrimination.

(9) Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized by this Court because the political franchise of voting is a fundamental political right, preservative of all rights.

(10) The violations of the provisions of the Oklahoma Constitution set forth in the Petition are incidental to the more serious contentions of violation of equal protection and due process under the federal Constitution, relevant to the merits herein complained of.

(11) Arbitrary numerical classification, as the sole basis for voting rights being granted to some individuals and withheld from other individuals otherwise equally qualified, is an inherently unreasonable basis for differing treatment of individual citizens by a state in a statutory scheme for urban redevelopment, and constitutes invidious discrimination requiring review on the merits by the U. S. Supreme Court.

CONCLUSION

The Petition for Certiorari complies with the Rules of this Court.

It presents a federal question of substance not heretofore specifically decided by this Court. It was decided by the Oklahoma Supreme Court in a way that is not in accord with the applicable decisions of this Court.

The petitioners are entitled to have certiorari issue for review of the Oklahoma Supreme Court decision on

the merits. Such decision should be reversed and the arbitrary statutory numerical classifications made to include some individuals and to exclude other individuals, on rights of franchise provided therein, as the sole basis for differing treatment, on the subject matter of urban renewal and redevelopment for both the included and excluded individuals patently constitutes invidious discrimination violative of the equal protection and due process requirements of the federal Constitution and requires the closest scrutiny by this Court on the merits.

Respectfully submitted,

THEODORE R. FISHER
LEWIS C. JOHNSON
200 Law Building
Tulsa, Oklahoma 74119
Attorneys for Petitioners

August, 1967.